

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

FLEMING SMITH, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 J. CLARK KELSO, Receiver; DONALD )  
 SPECTOR, Prison Law Office; )  
 MICHAEL BEIN; C.D.C.R., )  
 )  
 Defendants. )  
 )

No. C 13-3738 JSW (PR)

**ORDER OF DISMISSAL**

## INTRODUCTION

Plaintiff, a California prisoner at the California Training Facility (“CTF”), filed this pro se civil rights complaint under 42 U.S.C. § 1983. The complaint was dismissed with leave to amend. Plaintiff filed an amended complaint, and, for the reasons the case is DISMISSED.

## STANDARD OF REVIEW

Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." "Specific facts are not necessary; the statement need only "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests."" *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007) (citations omitted). Although in order to state a claim a complaint "does not need

1 detailed factual allegations, . . . a plaintiff's obligation to provide the 'grounds of his  
 2 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic  
 3 recitation of the elements of a cause of action will not do. . . . Factual allegations must  
 4 be enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v.*  
 5 *Twombly*, 127 S. Ct. 1955, 1964-65 (2007) (citations omitted). A complaint must proffer  
 6 "enough facts to state a claim for relief that is plausible on its face." *Id.* at 1974. Pro se  
 7 pleadings must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696,  
 8 699 (9th Cir. 1990).

9 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two elements:  
 10 (1) that a right secured by the Constitution or laws of the United States was violated, and  
 11 (2) that the alleged violation was committed by a person acting under the color of state  
 12 law. *West v. Atkins*, 487 U.S. 42, 48 (1988).

### 13 **LEGAL CLAIMS**

14 Plaintiff claims that he received inadequate care and accommodation for his  
 15 medical condition. The original complaint was dismissed because it did not identify  
 16 Plaintiff's medical condition, nor did Plaintiff describe the actions Defendants took or  
 17 failed to take that caused him to suffer inadequate medical care in violation of his Eighth  
 18 Amendment rights.

19 In his amended complaint, Plaintiff alleges that he suffers from a wide variety of  
 20 medical conditions, including vision, mobility and seizure problems. He alleges two  
 21 incidents of inadequate medical care. First, he alleges that an unnamed nurse negligently  
 22 stuck him in the thumb with a needle and then injected him with it. Second, he alleges  
 23 that an unnamed official or officials failed to provide him with seizure medication for 15  
 24 to 20 days and endangered him by assigning him an upper bunk on the fifth tier of his  
 25 cell block. Deliberate indifference to serious medical needs violates the Eighth  
 26 Amendment's proscription against cruel and unusual punishment. *See Estelle v. Gamble*,

1 429 U.S. 97, 104 (1976). Plaintiff alleges that prison officials were negligent in failing  
2 to provide adequate medical care. While negligence may form the basis of a claim of  
3 medical malpractice claim, negligence is insufficient to make out a violation of the  
4 Eighth Amendment. *See Toguchi v. Chung*, 391 F.3d 1051, 1060-61 (9th Cir. 2004).  
5 Plaintiff's allegations of negligence, while insufficient, would not be dispositive if, for  
6 example, he alleged facts that could plausibly suggest deliberate indifference. He does  
7 not. Consequently, plaintiff's claims of inadequate medical care fail to state a cognizable  
8 basis for relief under Section 1983.

9 Plaintiff also names two lawyers, Donald Spector and Michael Bein, as  
10 Defendants, as he did in the original complaint. Here, he alleges that they failed to  
11 adequately intervene or advocate on his behalf after he alerted them to his problems.  
12 These private attorneys have no constitutional duty to represent Plaintiff or advocate on  
13 his behalf in any civil lawsuit or administrative proceeding. Secondly, private attorneys  
14 are not state actors liable under Section 1983. *Simmons v. Sacramento County Superior*  
15 *Court*, 318 F.3d 1156, 1161 (9th Cir. 2003); *Franklin v. Oregon*, 662 F.2d 1337, 1345  
16 (9th Cir. 1981). Consequently, Plaintiff does not state a cognizable claim against the two  
17 attorney defendants.

18 Plaintiff has already been given an opportunity to amend his complaint once, but  
19 he does not state a cognizable claim for relief. The claims against the attorneys could not  
20 be amended to state a cognizable claim under Section 1983. The medical claims would  
21 have to be amended to claim that there was deliberate indifference, but such allegations  
22 would not be in good faith because Plaintiff has already alleged, under penalty of  
23 perjury, that defendants were simply being negligent. Accordingly, further leave to  
24 amend is not warranted.//

25 //


**CONCLUSION**

This case is DISMISSED for failure to state a cognizable claim for relief.

The Clerk shall enter judgment and close the file.

IT IS SO ORDERED.

DATED: December 11, 2013

  
\_\_\_\_\_  
JEFFREY S. WHITE  
United States District Judge

UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

FLEMING SMITH,

Plaintiff,

v.

CDCR et al,

Defendant.

Case Number: CV13-03738 JSW


**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on December 11, 2013, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Fleming Smith  
N.C.D.F.  
2254 Ordinance Road  
Santa Rosa, CA 95403

Dated: December 11, 2013

  
Richard W. Wieking, Clerk  
By: Jennifer Ottolini, Deputy Clerk